IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION.

CRIMINAL APPEAL NO.579 OF 2005

WITH

CRIMINAL APPLICATION NO.5069 OF 2005

Tulsiram Hiralal Sharma]
Age 45,]
At present in Judicial Custody]
Kolhapur Jail]
R/o.Harishankar Gaud Chawl]
Behind Shiv Sena Office S.V.Road]
Ambawadi, Dahisar (East)]
Mumbai - 400068.] Appellant

versus

The State of Maharashtra] Respondent.

Mr.Santosh Pande i/by ABG & Associates for the appellant.

Smt.V.R.Bhosale, APP, for the State.

CORAM : D.G.DESHPANDE &

V.M.KANADE, JJ.

DATED : 02nd December 2005.

ORAL ORDER

1. This appeal is filed by the appellant/original accused No.2 against his conviction for the offence of robbery coupled with murder. He was held guilty of the offences under Section 394 of the Indian Penal Code and sentenced to suffer RI for five years. He was also held guilty of the offence under section 302 r/w 34 of the Indian Penal Code and sentenced to life imprisonment. Further he was held guilty of the offence under Section 452 r/w 34 of the Indian Penal Code and sentenced to suffer RI for five years.

2. Along with this appeal, Criminal Application No.5069 of 2005 for bail has been filed by the appellant/accused No.2. While arguing for bail, the counsel for the appellant/accused No.2 pointed out that there is absolutely no evidence against the appellant/accused showing his connection to the offence of murder. None of the prosecution witnesses has seen him on the spot where offences of robbery and murder took place. No role of any

kind is attributed to him. No incriminating article connected with the murder or robbery is recovered from him or at his instance and, the only evidence that was produced by the prosecution against him is, the recovery of golden chain when he was apprehended at railway station. He also stated that, according to the panch witnesses, the golden chain was recovered from the suit case, whereas, as per the panchanama it was recovered while the accused was wearing it. Therefore, according to the counsel for the appellant/accused, in no case the appellant/accused can be convicted for the offences of robbery and murder and at most his conviction could be under section 379 or 411 of the Indian Penal Code. He also pointed out that after his arrest he was in custody for two months and he is in custody from the date of judgment i.e. 29.10.2003, therefore, he is in custody for more than two years. In view of this submission, we took up the appeal for final hearing by consent of both the advocate for the appellant and the learned APP in stead of deciding the bail application.

3. When questioned, the learned APP conceded

that there is no evidence of the prosecution about involvement of the accused/appellant in the offences of murder or robbery and, the only evidence against him is recovery of golden chain. The identification of golden chain is also contradicted. In the judgement of the lower court though all the aspects of the matter have been considered, the trial Court was not justified in convicting the accused/appellant under Sections, 302 or 394 r/w 34 along with other accused. He has no role to play in the offence of murder or robbery. None of the prosecution witnesses has seen him on the spot. There is no evidence of conspiracy against any of the accused. No weapon or incriminating article is recovered from him. Therefore, the only evidence of recovery of golden chain can be at the most result in conviction of the appellant/accused under section 379 or 411 of the Indian Penal Code. Since the appellant/accused cannot be said to have himself removed the golden chain under section 379 of the Indian Penal Code but for possession of stolen property, Section 411 of the Indian Penal Code will be appropriate section. So far as punishment is concerned, in any case, the appellant/accused is in custody for

more than two years. Looking to the value of golden chain, that period would be sufficient to meet the ends of justice. Hence we pass the following order :-

:ORDER:

Appeal is partly allowed.

Conviction of appellant/accused No.2 - Tulsiram Hiralal Sharma under section 394 of the Indian Penal Code, his conviction under section 302 r/w 34 of the Indian Penal Code and his conviction under section 452 r/w 34 of the Indian Penal Code are set aside.

The appellant/accused No.2 - Tulsiram Hiralal Sharma is convicted for the offence under Section 411 of the Indian Penal Code and sentenced him to suffer R.I. for two years.

He will be entitled to set off the period of detention and, therefore, the sentence undergone by him till today is

sufficient. He will be set at liberty forthwith if he is not required in any other case.

Criminal Application No.5069 of 2005 is for bail. It does not survive in view of the aforesaid order. It is disposed of

Appeal is disposed of.

[D.G.DESHPANDE,J]

[V.M.KANADE,J]